

BEFORE THE BOARD OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR  
RESERVATION OF WATER NO. 12332-r42K  
BY THE U.S. BUREAU OF RECLAMATION

)  
) FINDINGS OF FACT AND CON-  
) CLUSIONS OF LAW OF APPLI-  
) CATION NO. 12332-r42K  
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The above-entitled matter came on regularly for hearing on or about August 31, 1977, in Billings, Montana, before the Montana Board of Natural Resources and Conservation and its duly appointed Hearing Examiner, James Driscoll. The Applicant appeared by and through its counsel of record, Thomas Gai. The Montana Department of Natural Resources and Conservation appeared by and through its counsel of record, Richard Gordon. The Montana Department of Health and Environmental Sciences appeared by and through its counsel of record, Mona Jamison. The Montana Department of Fish and Game appeared by and through its counsel of record, F. Woodside Wright and Clayton Herron. The fourteen applicant conservation districts appeared by and through their counsel of record, Gary Spaeth. Utah International, Inc., appeared by and through its counsel of record, Urban Roth. The Montana Power Company appeared by and through its counsel of record, Robert Woodahl. Intake Water Company appeared by and through its counsel of record, Henry Loble. Witnesses were duly sworn, and oral and documentary evidence was introduced.

The Board, having read and fully considered the complete record, makes the following Findings of Fact and Conclusions of Law relating

to the U.S. Bureau of Reclamation, Application No. 12332-r42K, for  
Sunday Creek offstream storage:

### FINDINGS OF FACT

1. The U.S. Bureau of Reclamation has applied for the reservation of 539,000 acre-feet of water per year (af/y) from the Yellowstone River for storage in the proposed Sunday Creek reservoir to be used for municipal, industrial, recreation, and fish and wildlife purposes (U.S. Bureau of Reclamation, Application No. 12332-r42K).

2. The reservoir, with a capacity of 678,000 acre-feet, would inundate 13,700 acres on the north side of the Yellowstone River in Custer County near the Miles City airport (U.S. Bureau of Reclamation, Application No. 12332-r42K).

#### Findings Related to the Purpose of the Reservation (89-890(3)(a)).

3. The purpose of the reservation request is to divert and store water for release during critical summer flow periods (Tr. Vol. 18, following p. 179, Testimony of Derwood Mercer, p. 12).

4. The released water would replace or augment flows used for municipal, industrial, recreation, water quality, aquatic resource maintenance, irrigation, sanitation, and fish and wildlife purposes (Tr. Vol. 18, following p. 179, Testimony of Mercer, p. 12).

5. The purposes and uses are similar for all three U.S. Bureau of Reclamation proposed offstream storage projects along the Yellowstone River (Tr. Vol. 19, Cross of Mercer, p. 10; Tr. Vol. 18, following p. 179, Testimony of Mercer, pp. 7 and 10).

6. It is established to the satisfaction of the Board that a purpose of the reservation has been shown (Findings 3 through 5).

#### Findings Related to the Need for the Reservation (89-890(3)(b)).

7. The need for each of the three U.S. Bureau of Reclamation offstream

storage projects depends on the level of water reservation requests granted to the other applicants (Tr. Vol. 19, Cross of Mercer, pp. 10 and 51).

8. Certain reservation requests of other applicants are granted herein (See "Order," ¶ 1 through 96).

9. It is established to the satisfaction of the Board that a need has been shown for the reservation of water to be stored in Sunday Creek Reservoir in Custer County (Findings 7 and 8).

Findings Related to the Amount of Water Necessary for the Purpose of the Reservation (89-890(3)(c)).

10. The Application is for a maximum annual need of 539,000 acre-feet of water from the Yellowstone River to be stored in an offstream reservoir (U.S. Bureau of Reclamation, Application No. 12332-r42K).

11. Annual flow data shows that the maximum annual need would not be required every year (Tr. Vol. 19, Testimony of Mercer).

12. The offstream reservoir would provide storage so that water could be returned to the river for irrigation uses, municipal uses and industrial uses (Tr. Vol. 19, Testimony of Mercer).

13. With an offstream reservoir, the instream flows could be regulated so as to protect water quality and recreational use for fish and wildlife use (Tr. Vol. 19, Testimony of Mercer).

14. Water would be pumped from the river during periods of excess flows and returned to the river during months of low flows (Tr. Vol. 19, Testimony of Mercer).

15. The anticipated increase in energy-related depletions projected for the Mid- and Lower Yellowstone subbasins under the intermediate level of development by the year 2000 is 75,490 af/y (Draft EIS, Vol. II, p. 230).

16. The anticipated increase in irrigation depletions projected for the Mid- and Lower Yellowstone subbasins under the intermediate level of development

by the year 2000 is 83,840 af/y (Draft EIS, Vol. II, p. 239).

17. The total anticipated increase in depletions projected for the Mid- and Lower Yellowstone subbasins under the intermediate level of development for these two uses by the year 2000 is 159,330 af/y (Findings 15 and 16).

18. A purpose of the reservation is to provide stored water for uses such as those discussed above in Findings 12, 13, 14 and 15 (Tr. Vol. 18, following p. 179, Testimony of Mercer, p. 12; Finding 4).

19. It is established to the satisfaction of the Board that the applied for 539,000 af/y of water is a reasonable amount of water necessary for the purpose of the reservation (Findings 15 through 18).

20. It is further established by the Board that the Bureau of Reclamation may only withdraw water from the Yellowstone River during high flows.

Findings Related to the Public Interest (89-890(3)(d)).

21. Stored water would be released from the proposed project to augment flows during critical summer periods (Tr. Vol. 18, following p. 179, Testimony of Mercer, p. 12).

22. Stored water would be available from the proposed project for new diversionary uses (Tr. Vol. 18, following p. 179, Testimony of Mercer, p. 121).

23. Possible effects of the proposed project on the ecosystem include establishment of a multispecies warm-water fishery, introduction of muskrat into the area, and attraction of migratory waterfowl (Draft Addendum EIS, pp. 34 and 37).

24. Increased number of waterfowl could benefit hunters and sightseers, and flatwater recreation and fishing opportunities would be expanded (Draft Addendum EIS, pp. 36 and 38).

25. It is established to the satisfaction of the Board that the reservation of 539,000 af/y from the Yellowstone River for storage at the Sunday Creek site in Custer County near the Miles City airport is in the public interest and that there will be progress toward accomplishment of the purpose with reasonable diligence in accordance with an established plan (Bureau of Reclamation, Application No. 12332-r42K).

26. The public interest requires that specific design, construction, and operating plans; economic, social, and environmental analysis; time schedules; and probable allocations of water to various beneficial uses be supplied so that other water users in the basin may know the status of the proposed Sunday Creek Project and the amount of water available for appropriation (Application No. 12332-r42K).

#### CONCLUSIONS OF LAW

1. Chapter 8, Title 89, R.C.M. 1947, and in particular, Section 89-890, R.C.M. 1947, authorizes the adoption by the Montana Board of Natural Resources and Conservation of orders reserving water to qualified applicants for reservations of water.

2. If ordered adopted, a reservation must be ordered adopted in accordance with Chapter 8, Title 89, R.C.M. 1947, and any rules adopted thereunder.

3. The Applicant, U.S. Bureau of Reclamation, an agency of the State of Montana, is entitled to apply to reserve waters within the State of Montana in accordance with Section 89-890, R.C.M. 1947, and any rules adopted thereunder.

4. All pertinent statutes and rules of the State of Montana have been adhered to in the review of this reservation Application, both by the Montana Department of Natural Resources and Conservation and by the Montana Board of Natural Resources and Conservation.

5. Based upon the above Findings, and specifically based upon any condition, limitation, or modification of the full Application appearing in said Findings, all pertinent criteria delineated at Section 89-890, R.C.M. 1947, and any rules adopted thereunder providing for the adoption of an order reserving water have been met.

6. Nothing found herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything found herein have bearing on the status of claimed water rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.